THE WHITE HOUSE

WASHINGTON

February 12, 2003

Dear Senator Daschle and Senator Leahy:

On behalf of President Bush, I write in response to your letter to the President dated February 11, 2003. In the letter, you renew your previous request for confidential Department of Justice memoranda in which Mr. Estrada provided appeal, certiorari, and amicus recommendations while he was a career attorney in the Office of Solicitor General for four years in the Clinton Administration and one year in the George H.W. Bush Administration. You also request that Mr. Estrada answer certain questions beyond the extensive questions that he already answered appropriately and forthrightly during his Committee hearing and in follow-up written responses.

We respect the Senate's constitutional role in the confirmation process, and we agree that the Senate must make an informed judgment consistent with its traditional role and practices. However, your requests have no persuasive support in the history and precedent of judicial appointments. Indeed, the relevant history and precedent convincingly demonstrate that a new and shifting standard is being applied to Miguel Estrada.

First, as the Department of Justice explained in its letters of June 5, 2002, October 8, 2002, and January 23, 2003, all living former Solicitors General (four Democrats and three Republicans) have strongly opposed your request for Solicitor General memoranda and stated that it would sacrifice and compromise the ability of the Justice Department to effectively represent the United States in court. Even more telling, we are informed that the Senate has not requested memos such as these for *any* of the 67 appeals court nominees since 1977 who had previously worked in the Justice Department (including the seven nominees who had previously worked in the Solicitor General's office). The few isolated examples you have cited – in which targeted requests for particular documents about specific issues were accommodated for nominees to positions other than the U.S. Courts of Appeals – similarly do not support your request here.

Second, as explained more fully below with respect to your request that Mr. Estrada answer additional questions, the only specific question identified in your letter refers to his judicial role models. You claim that Mr. Estrada refused to answer a question on this topic. In fact, in his written responses to Senator Durbin's question on this precise subject that Mr. Estrada submitted three months ago, he cited Justice Anthony Kennedy, Justice Lewis Powell, and Judge Amalya Kearse as judges he admires (he clerked for Justice Kennedy and Judge Kearse), and he further pointed out, of course, that he would seek to resolve cases as he analyzed them "without any preconception about how some other judge might approach the question." Your letter to the President ignores Mr. Estrada's answer to this question. In any event, beyond this one query, your letter does not pose any additional questions to him. Additionally, neither of you has posed *any* written questions to Mr. Estrada in the more than three months since his all-day Committee hearing. Since the hearing, Mr. Estrada also has met (and continues to meet) with numerous Democrat Senators interested in learning more about his record. Finally, as I will

explain below, Mr. Estrada forthrightly answered numerous questions about his judicial approach and views in a manner that matches or greatly exceeds answers demanded of previous appeals court nominees.

With respect, it appears that a double standard is being applied to Miguel Estrada. That is highly unfair and inappropriate, particularly for this well-qualified and well-respected nominee.

I will turn now in more detail to the various issues raised by your letter. I will address them at some length given the importance of this issue and the nature of your requests.

I. Miguel Estrada's Qualifications and Bipartisan Support

Miguel Estrada is an extraordinarily qualified judicial nominee. The American Bar Association, which Senators Leahy and Schumer have referred to as the "gold standard," *unanimously* rated Estrada "well qualified" for the D.C. Circuit, the ABA's highest possible rating. The ABA rating was entirely appropriate in light of Mr. Estrada's superb record as Assistant to the Solicitor General in the Clinton and George H.W. Bush Administrations, as a federal prosecutor in New York, as a law clerk to Justice Kennedy, and in performing significant *pro bono* work.

Some who are misinformed have seized on Mr. Estrada's lack of prior judicial experience, but five of the eight judges currently serving on the D.C. Circuit had no prior judicial experience, including two appointees of President Clinton and one appointee of President Carter. Miguel Estrada has tried numerous cases before federal juries, argued many cases in the federal appeals courts, and argued 15 cases before the Supreme Court of the United States. That is a record that few judicial nominees can match. And few lawyers, whatever their ideology or philosophy, have volunteered to represent a death row inmate *pro bono* before the Supreme Court as did Miguel Estrada.

Mr. Estrada's excellent legal qualifications are all the more extraordinary given his personal history. Simply put, Miguel Estrada is an American success story. He came to this country at age 17 from Honduras speaking little English. Through hard work and dedicated service to the United States, Miguel Estrada has risen to the very pinnacle of the legal profession. If confirmed, he would be the first Hispanic judge to sit on the U.S. Court of Appeals for the D.C. Circuit. Given his record, his background, and his integrity, it is no surprise that Miguel Estrada is strongly supported by the vast majority of national Hispanic organizations. The League of United Latin American Citizens (LULAC), for example, wrote to Senator Leahy to urge Mr. Estrada's confirmation and explain that he "is truly one of the rising stars in the Hispanic community and a role model for our youth." A group of 19 Hispanic organizations, including LULAC and the Hispanic National Bar Association, recently wrote to the Senate urging "on behalf of an overwhelming majority of Hispanics in this country" that "both parties in the U.S. Senate . . . put partisan politics aside so that Hispanics are no longer denied representation in one of the most prestigious courts in the land."

The current effort to filibuster Mr. Estrada's nomination is particularly unjustified given that those who have worked with Miguel -- including prominent Democrat lawyers whom you

know well -- strongly support his confirmation. For example, Ron Klain, who served as a high-ranking adviser to former Vice President Gore and former Chief Counsel to the Senate Judiciary Committee, wrote: "Miguel is a person of outstanding character, tremendous intellect, and with a deep commitment to the faithful application of precedent. . . . [T]he challenges that he has overcome in his life have made him genuinely compassionate, genuinely concerned for others, and genuinely devoted to helping those in need."

President Clinton's Solicitor General, Seth Waxman, wrote: "During the time Mr. Estrada and I worked together, he was a model of professionalism and competence. . . . In no way did I ever discern that the recommendations Mr. Estrada made or the analyses he propounded were colored in any way by his personal views – or indeed that they reflected any consideration other than the long-term interests of the United States. I have great respect both for Mr. Estrada's intellect and for his integrity."

A bipartisan group of 14 former colleagues in the Office of the Solicitor General at the U.S. Department of Justice wrote: "We hold varying ideological views and affiliations that range across the political spectrum, but we are unanimous in our conviction that Miguel would be a fair and honest judge who would decide cases in accordance with the applicable legal principles and precedents, not on the basis of personal preferences or political viewpoints." One former colleague, Richard Seamon, wrote that he is a pro-choice, lifelong Democrat with self-described "liberal views on most issues" who said he would "consider it a disgrace" if Mr. Estrada is not confirmed.

Similarly, Leonard Joy, head of the Federal Defender Division of the Legal Aid Society of New York, wrote that "Miguel would make an excellent Circuit Court Judge. He is as fine a lawyer as I have met and, on top of all his intellectual abilities and judgment he would bring to bear, he would bring a desirable diversity to the Court. I heartily recommend him."

Beyond the extensive personal testimony from those who worked side-by-side with him for many years, the performance reviews of Miguel for the years that he worked in the Office of Solicitor General gave him the highest possible rating of "outstanding" in every possible category. The reviews stated that Miguel:

- "states the operative facts and applicable law completely and persuasively, with record citations, and in conformance with court and office rules, and with concern for fairness, clarity, simplicity, and conciseness."
- "[i]s extremely knowledgeable of resource materials and uses them expertly; acting independently, goes directly to point of the matter and gives reliable, accurate, responsive information in communicating position to others."
- "[a]ll dealings, oral and written, with the courts, clients, and others are conducted in a diplomatic, cooperative, and candid manner."
- "[a]ll briefs, motions or memoranda reviewed consistently reflect no policies at variance with Departmental or Governmental policies, or fails to discuss and analyze relevant authorities."
- "[i]s constantly sought for advice and counsel. Inspires co-workers by example."

In the two years that Miguel Estrada and Paul Bender worked together, Mr. Bender signed those reviews. These employment reviews thus call into serious question some press reports containing a negative comment from Mr. Bender about Mr. Estrada's temperament (which is the only negative comment made by anyone who actually knows Mr. Estrada). Just as important, President Clinton's Solicitor General Seth Waxman expressly refuted Mr. Bender's statement.

In sum, based on his experience, his intellect, his integrity, and his bipartisan support, Miguel Estrada should be confirmed promptly.

II. The Senate's Role

President Bush nominated Miguel Estrada nearly two years ago on May 9, 2001. As explained above, he is well-qualified and well-respected. By any traditional measure that the Senate has used to evaluate appeals court nominees, Miguel Estrada should have been confirmed long ago. Your letter and public statements indicate, however, that you are applying both a new standard and new tactics to this particular nominee.

As to the standard, the Senate has a very important role in the process, but the Senate's traditional approach to appeals court nominees, and the approach envisioned by the Constitution's Framers, is far different from the standard that you now seek to apply. Senator Biden stated the traditional approach in 1997: "Any person who is nominated for the district or circuit court who, in fact, any Senator believes will be a person of their word and follow stare decisis, it does not matter to me what their ideology is, as long as they are in a position where they are in the general mainstream of American political life, and they have not committed crimes of moral turpitude, and have not, in fact, acted in a way that would shed a negative light on the court." Congressional Record, March 19, 1997. Alexander Hamilton explained that the purpose of Senate confirmation is to prevent appointment of "unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity." Federalist No. 76. It was anticipated that the Senate's approval would not often be refused unless there were "special and strong reasons for the refusal." No. 76.

As to tactics, you have indicated that some Senate Democrats intend to filibuster to prevent a vote on this nominee. As you know, there has never been a successful filibuster of a court of appeals nominee. Only a few years ago, Senator Leahy and other Democrat Senators expressly agreed with then-Governor Bush that every judicial nominee was entitled to an up-or-down floor vote within a reasonable time. On October 3, 2000, for example, Senator Leahy stated:

> Governor Bush and I, while we disagree on some issues, have one very significant issue on which we agree. He gave a speech a while back and criticized what has happened in the Senate where confirmations are held up not because somebody votes down a nominee but because they cannot ever get a vote. Governor Bush said: You have the nominee. Hold the hearing. Then, within 60 days, vote them up or vote them down. Don't leave them in limbo. *Frankly, that is what we are paid to do in this body. We are paid to vote either yes or no – not vote maybe*. When we hold a nominee up by not allowing them a

> vote and not taking any action one way or the other, we are not only voting 'maybe,' but we are doing a terrible disservice to the man or woman to whom we do this.

Senator Daschle similarly stated on October 5, 1999, that "[t]he Senate is surely under no obligation to confirm any particular nominee, but after the necessary time for inquiry it should vote him up or vote him down. An up or down vote, that is all we seek for Berzon and Paez. And after years of waiting, they deserve at least that much."

In his East Room speech of October 30, 2002, President Bush reiterated that every judicial nominee deserves a timely up-or-down floor vote in the Senate, no matter who is President or which party controls the Senate. Contrary to President Bush's attempts at permanent reform to bring order to the process, your current effort to employ a filibuster and block an up-or-down vote on the Estrada nomination may significantly exacerbate the cycle of bitterness and recrimination that President Bush has sought to resolve on a bipartisan basis. We fear that the damage caused by a filibuster could take many years to undo. To continue on this path would also be, in Senator Leahy's words, "a terrible disservice" to Mr. Estrada. We urge you to reconsider this extraordinary action, to end the filibuster of Mr. Estrada's nomination, and to allow the full Senate to vote up or down.

III. Request for Confidential Solicitor General Memos

You have suggested that Mr. Estrada's background, experience, and support are insufficient to assess his suitability for the D.C. Circuit. You have renewed your request for Solicitor General memos authored by Mr. Estrada. But every living former Solicitor General signed a joint letter to the Senate opposing your request. The letter was signed by Democrats Archibald Cox, Walter Dellinger, Drew Days, and Seth Waxman. They stated: "Any attempt to intrude into the Office's highly privileged deliberations would come at the cost of the Solicitor General's ability to defend vigorously the United States' litigation interests – a cost that also would be borne by Congress itself. . . . Although we profoundly respect the Senate's duty to evaluate Mr. Estrada's fitness for the federal judiciary, we do not think that the confidentiality and integrity of internal deliberations should be sacrificed in the process."

It bears mention that the interest asserted here is that of the United States, not the personal interest of Mr. Estrada. Indeed, Mr. Estrada himself testified that "I have not opposed the release of those records. . . . I am exceptionally proud of every piece of legal work that I have done in my life. If it were up to me as a private citizen, I would be more than proud to have you look at everything that I have done for the government or for a private client."

The history of Senate confirmations of nominees who had previously worked in the Department of Justice makes clear that an unfair double standard is being applied to Miguel Estrada's nomination. Since the beginning of the Carter Administration in 1977, the Senate has approved 67 United States Court of Appeals nominees who previously had worked in the Department of Justice. Of those 67 nominees, 38 had no prior judicial experience, like Miguel Estrada. The Department of Justice's review of those nomination records disclosed that in *none* of those cases did the Department of Justice produce internal deliberative materials created by

the Department. In fact, the Department's review disclosed that the Senate did not even request such materials for *a single one* of these 67 nominees.

Of this group of 67 nominees, seven were nominees who had worked as a Deputy Solicitor General or Assistant to the Solicitor General. These seven nominees, nominated by Presidents of each party and confirmed by Senates controlled by each party, included Samuel Alito, Danny Boggs, William Bryson, Frank Easterbrook, Daniel Friedman, Richard Posner, and Raymond Randolph.

The five isolated historical examples you have cited do not support your current request. In each of those five cases, the Committee made a targeted request for specific information primarily related to allegations of misconduct or malfeasance identified by the Committee. Even in those isolated cases, the vast majority of deliberative memoranda written by those nominees were neither requested nor produced. With respect to Judge Bork's nomination, for example, the Committee received access to certain particular memoranda (many related to Judge Bork's involvement in Watergate-related issues). The vast majority of memoranda authored by Judge Bork were never received. With respect to Judge Trott, the Committee requested documents unrelated to Judge Trott's service to the Department. So, too, in the three other examples you cite, the Committee requested specific documents primarily related to allegations of misconduct or malfeasance identified by the Committee. Of course, no such allegations have been made in the case of Mr. Estrada.

In sum, the examples you have cited only highlight the lack of precedent for the current request. As the Justice Department has explained to you previously, the existence of a few isolated examples where the Executive Branch on occasion accommodated a Committee's targeted requests for very specific information primarily related to allegations of misconduct does not in any way alter the fundamental and long-standing principle that memos from the Office of Solicitor General – and deliberative Department of Justice memoranda more broadly – must remain protected in the confirmation context so as to maintain the integrity of the Executive Branch's decisionmaking process. That is a fundamental principle that has been followed irrespective of the party that controls the White House and the Senate.

Your continued requests for these memoranda have provoked a foreseeable and inevitable conflict that, in turn, has been cited as a basis for obstructing a vote on Mr. Estrada's nomination. Respectfully, the conflict is unnecessary because your desire to assess the nominee can be readily accommodated in many ways other than intruding into and severely damaging the deliberative process of the Office of Solicitor General. For example, you can review Mr. Estrada's written briefs and oral arguments both as an attorney for the United States and in private practice. As you know, those documents are publicly available and easily accessible; that said, we would be pleased to facilitate your access to them. (Mr. Estrada's hearing transcript suggests that no Democrat Member of the Committee had read Mr. Estrada's many dozens of Solicitor General merits briefs, certiorari petitions, and opposition briefs or the transcripts of his 14 oral arguments when he represented the United States.) You also may consider the opinions of others who served in the Office at the same time (discussed above) and examine the nominee's written performance reviews (also discussed above). There is more than ample

information for you to assess Mr. Estrada's qualifications and suitability for the D.C. Circuit based on the traditional standards the Senate has employed.

It also is important to recognize that political appointees of President Clinton have read virtually all of the memoranda in question – namely, the Democrat Solicitors General Drew Days, Walter Dellinger, and Seth Waxman. None of those three highly respected Democrat lawyers has expressed any concern whatever about Mr. Estrada's nomination. Indeed, Mr. Waxman wrote a letter of strong support, and Mr. Days made public statements in support of Mr. Estrada.

In sum, the historical record and past precedent convincingly demonstrate that this request creates and applies an unfair double standard to Miguel Estrada.

IV. Request that Miguel Estrada Answer Additional Questions

Your letter also suggests that Miguel Estrada should answer certain questions that he allegedly did not answer in his hearing. To begin with, we do not know what your specific questions are. In addition, this request frankly comes as a surprise given that (i) Senator Schumer chaired the hearing on Mr. Estrada, (ii) the hearing lasted an entire day, (iii) Senators at the all-day hearing asked numerous far-reaching questions that Mr. Estrada answered forthrightly and appropriately, and (iv) only two of the 10 Democrat Senators then on the Committee even submitted any follow-up written questions, and they submitted only a few questions (in marked contrast to other nominees who received voluminous follow-up questions).

It also bears mention that Mr. Estrada has personally met with a large number of Democrat Senators, including Senators Landrieu, Lincoln, Bill Nelson, Ben Nelson, Leahy, Feinstein, Kohl, and Breaux; is scheduled to meet with Senator Carper; and would be pleased to meet with additional Senators.

The only specific question your letter identifies refers to Mr. Estrada's judicial role models, and you claim that he refused to answer a question on this topic. In fact, in Mr. Estrada's written responses to Senator Durbin's question on this precise subject, Mr. Estrada cited Justice Anthony Kennedy, Justice Lewis Powell, and Judge Amalya Kearse as judges he admires, and he further pointed out, of course, that he would seek to resolve cases as he analyzed them "without any preconception about how some other judge might approach the question."

In our judgment, moreover, Mr. Estrada answered the Committee's questions in a manner that was both entirely appropriate and entirely consistent with the approach that judicial nominees of Presidents of both parties have taken for many years. Your suggestions to the contrary do not square with the hearing record or traditional practice.

A. Judicial Ethics and Traditional Practice

In assessing your request that Miguel Estrada did not answer appropriate questions, we begin with rules of judicial ethics that govern prospective nominees. Canon 5A(3)(d) provides that prospective judges "shall not . . . make statements that commit *or appear to commit* the candidate with respect to cases, controversies or issues that are likely to come before the court"

(emphasis added). Justice Thurgood Marshall made the point well in 1967 when asked about the Fifth Amendment: "I do not think you want me to be in a position of giving you a statement on the Fifth Amendment and then, if I am confirmed and sit on the Court, when a Fifth Amendment case comes up, I will have to disqualify myself." Lloyd Cutler, who served as Counsel to President Carter and President Clinton, has stated that "candidates should decline to reply when efforts are made to find out how they would decide a particular case."

In 1968, in the context of the Justice Abe Fortas' nomination to be Chief Justice, the Senate Judiciary Committee similarly stated: "Although recognizing the constitutional dilemma which appears to exist when the Senate is asked to advise and consent on a judicial nominee without examining him on legal questions, the Committee is of the view that Justice Fortas wisely and correctly declined to answer questions in this area. To require a Justice to state his views on legal questions or to discuss his past decisions before the Committee would threaten the independence of the judiciary and the integrity of the judicial system itself. It would also impinge on the constitutional doctrine of separation of powers among the three branches of Government as required by the Constitution." S. Exec. Rep. No. 8, 90th Cong. 2d Sess. 5 (1968).

Even in the context of a Supreme Court confirmation hearing, Senator Kennedy defended Sandra Day O'Connor's refusal to discuss her views on abortion: "It is offensive to suggest that a potential Justice of the Supreme Court must pass some presumed test of judicial philosophy. It is even more offensive to suggest that a potential justice must pass the litmus test of any single-issue interest group." Nomination of Sandra O'Connor: Hearings Before the Senate Comm. on the Judiciary on the Nomination of Judge Sandra Day O'Connor of Arizona to Serve as an Associate Justice of the Supreme Court of the United States, 97th Cong. 6 (1981) (statement of Sen. Kennedy).

Justice Ruth Bader Ginsburg likewise declined to answer certain questions: "Because I am and hope to continue to be a judge, it would be wrong for me to say or to preview in this legislative chamber how I would cast my vote on questions the Supreme Court may be called upon to decide. Were I to rehearse here what I would say and how I would reason on such questions, I would act injudiciously." Similarly, Justice John Paul Stevens stated in his hearing: "I really don't think I should discuss this subject generally, Senator. I don't mean to be unresponsive but in all candor I must say that there have been many times in my experience in the last five years where I found that my first reaction to a problem was not the same as the reaction I had when I had the responsibility of decisions and I think that if I were to make comments that were not carefully thought through they might be given significance that they really did not merit."

Justice Ginsburg described the traditional practice in a case decided last year: "In the context of the federal system, how a prospective nominee for the bench would resolve particular contentious issues would certainly be 'on interest' to the President and the Senate . . . . *But in accord with a longstanding norm,* every Member of this Court declined to furnish such information to the Senate, and presumably to the President as well." *Republican Party of Minnesota v. White*, 122 S. Ct. 2528, 2552 n.1 (2002) (Ginsburg, J., dissenting) (emphasis added). Justice Ginsburg added that this adherence to this "longstanding norm" was "crucial to the health of the Federal Judiciary." *Id*. In his majority opinion, Justice Scalia did not take issue

with that description and added: "Nor do we assert that candidates for judicial office should be *compelled* to announce their views on disputed legal issues." *Id.* at 2539 n.11 (emphasis in original).

In some recent hearings, including Mr. Estrada's, Senator Schumer has asked that nominees identify particular Supreme Court cases of the last few decades with which they disagree. But the problems with such a question and answer were well stated by Justice Stephen Breyer. As Justice Breyer put it, "Until [an issue] comes up, I don't really think it through with the depth that it would require. . . . So often, when you decide a matter for real, in a court or elsewhere, it turns out to be very different after you've become informed and think it through for real than what you would have said at a cocktail party answering a question." 34 U.C. Davis L. Rev. 425, 462.

Senator Schumer also has asked nominees how they would have ruled in particular Supreme Court cases. Again, a double standard is being applied. The nominees of President Clinton did not answer such questions. For example, Richard Tallman, a nominee with no prior judicial service who would now serves on the Ninth Circuit, not only would not answer how he would have ruled as a judge in *Roe v. Wade* – but even how he would have ruled in *Plessy v. Ferguson,* the infamous case that upheld the discredited and shameful "separate but equal" doctrine. So, too, in the hearing on President Clinton's nomination of Judges Barry and Fisher, Senator Smith asked whether the nominees would have voted for a constitutional right to abortion before *Roe v. Wade*. Chairman Hatch interrupted Senator Smith to say "that is not a fair question to these two nominees because regardless of what happened pre-1973, they have to abide by what has happened post-1973 and the current precedents that the Supreme Court has."

B. Answers by Miguel Estrada

Miguel Estrada answered the Committee's questions forthrightly and appropriately. Indeed, Miguel Estrada was *more* expansive than many judicial nominees traditionally have been in Senate hearings, and he was asked a far *broader* range of questions than many previous appeals court nominees were asked. We will catalogue here a select sample of his answers.

Unenumerated rights, privacy, and abortion

When asked by Senator Edwards about the Constitution's protection for rights not enumerated in the Constitution, Mr. Estrada replied: "I recognize that the Supreme Court has said [on] numerous occasions in the area of privacy and elsewhere that there are unenumerated rights in the Constitution, and I have no view of any sort, whether legal or personal, that would hinder me from applying those rulings by the court. But I think the court has been quite clear that there are a number of unenumerated rights in the Constitution. In the main, the court has recognized them as being inherent in the right of substantive due process and the liberty clause of the Fourteenth Amendment."

When asked by Senator Feinstein whether the Constitution encompasses a right to privacy and abortion, Mr. Estrada responded, "The Supreme Court has so held, and I have no view of any nature whatsoever, whether it be legal, philosophical, moral, or any other type of

view that would keep me from applying that case law faithfully." When asked whether *Roe v. Wade* was "settled law," Mr. Estrada replied, "I believe so."

General Approach to Judging

When asked by Senator Edwards about judicial review, Mr. Estrada explained: "Courts take the laws that have been passed by you and give you the benefit of understanding that you take the same oath that they do to uphold the Constitution, and therefore they take the laws with the presumption that they are constitutional. It is the affirmative burden of the plaintiff to show that you have gone beyond your oath. If they come into court, then it is appropriate for courts to undertake to listen to the legal arguments – why it is that the legislature went beyond [its] role as a legislat[ure] and invaded the Constitution."

Mr. Estrada stated to Senator Edwards that there are 200 years of Supreme Court precedent and that it is *not* the case that "the appropriate conduct for courts is to be guided solely by the bare text of the Constitution because that is not the legal system that we have."

When asked by Senator Edwards whether he was a strict constructionist, Mr. Estrada replied that he was "a fair constructionist" – meaning that "I don't think that it should be the goal of courts to be strict or lax. The goal of courts is to get it right. . . . It is not necessarily the case in my mind that, for example, all parts of the Constitution are suitable for the same type of interpretative analysis. . . . [T]he Constitution says, for example, that you must be 35 years old to be our chief executive. . . . There are areas of the Constitution that are more open-ended. And you adverted to one, like the substantive component of the due process clauses, where there are other methods of interpretation that are not quite so obvious that the court has brought to bear to try to bring forth what the appropriate answer should be."

When Senator Kohl asked him about environmental statutes, for example, Mr. Estrada explained that those statutes come to court "with a strong presumption of constitutionality."

In response to Senator Leahy, Mr. Estrada described the most important attributes of a judge: "The most important quality for a judge, in my view Senator Leahy, is to have an appropriate process for decisionmaking. That entails having an open mind. It entails listening to the parties, reading their briefs, going back beyond those briefs and doing all of the legwork needed to ascertain who is right in his or her claims as to what the law says and what the facts [are]. In a court of appeals court, where judges sit in panels of three, it is important to engage in deliberation and give ear to the views of colleagues who may have come to different conclusions. And in sum, to be committed to judging as a process that is intended to give us the right answer, not to a result. And I can give you my level best solemn assurance that I firmly think I do have those qualities or else I would not have accepted the nomination."

In response to Senator Durbin, Miguel Estrada stated that "the Constitution, like other legal texts, should be construed reasonably and fairly, to give effect to all that its text contains."

Mr. Estrada indicated to Senator Durbin that he admired the judges for whom he clerked, Justice Kennedy and Judge Kearse, as well as Justice Lewis Powell.

Mr. Estrada stated to Senator Durbin that "I can absolutely assure the Committee that I will follow binding Supreme Court precedent until and unless such precedent has been displaced by subsequent decisions of the Supreme Court itself."

In response to Senator Grassley, Mr. Estrada stated: "When facing a problems for which there is a not a decisive precedent from a higher court, my cardinal rule would be to seize aid from anyplace where I could get it. Depending on the nature of the problem, that would include related case law in other areas that higher courts had dealt with that had had some insights to teach with respect to the problem at hand. It could include the history of the enactment, including in the case of a statute legislative history. It could include the custom and practice under any predecessor statute or document. It could include the views of academics to the extent that they purport to analyze what the law is instead of – instead of prescribing what it should be. And in sum, as Chief Justice Marshall once said, to attempt not to overlook anything from which aid might be derived."

In response to Senator Sessions, Estrada stated: "I am very firmly of the view that although we all have views on a number of subjects from A to Z, the first duty of a judge is to self-consciously put that aside and look at each case by starting withholding judgment with an open mind and listen to the parties. So I think that the job of a judge is to put all of that aside, and to the best of his human capacity to give a judgment based solely on the arguments and the law."

In response to Senator Sessions, Mr. Estrada stated that "I will follow binding case law in every case. . . . I may have a personal, moral, philosophical view on the subject matter. But I undertake to you that I would put all that aside and decide cases in accordance with binding case law and even in accordance with the case law that is not binding but seems constructive on the area, without any influence whatsoever from any personal view I may have about the subject matter."

Miranda/Stare Decisis

Mr. Estrada stated that *United States v. Dickerson* – a case raising the question whether *Miranda* should be overruled – reflected a "reasonable application of the doctrine of stare decisis. In my view, it is rarely appropriate for the Supreme Court to overturn one of its own precedents."

Affirmative Action

With respect to affirmative action, Mr. Estrada responded to Senator Kennedy that "any policy views I might have as a private citizen on the subject of affirmative action would not enter into how I would approach any case that comes before me as a judge. Under controlling Supreme Court authority, particularly *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), if a government program creates a racial classification, it will be subject to strict scrutiny. Whether the program survives that sort of scrutiny will often involve a highly contextual and fact-specific inquiry into the nature of the justifications asserted by the government and the fit

between those justifications and the classification at issue. *Adarand* and similar cases provide the framework that I would be required to apply, and would apply, in considering these issues as a judge."

Asked by Senator Leahy about the strict scrutiny test, Mr. Estrada replied, "the Supreme Court in the *Adarand* case stated, as a general rule, that the consideration of race is subject to strict scrutiny. That means that though it may be used in some cases, it has to be justified by a compelling state interest. And with respect to the particular context, there must be a fairly fact-bound individual assessment of the fit between the interest that is being asserted and the category being used. That is just another way of saying that it is a very fact-intensive analysis in the context of a specific program and in the context of the justifications that are being offered in support of the program."

Congressional Authority

With respect to the outer limits of Congress' power to confer authority on other governmental bodies, Miguel responded to Senator Kennedy that the Supreme Court has said that "particular factual context is significant in analyzing the appropriateness of a particular delegation. . . . Of course, the fact that the Supreme Court only rarely has struck down statutes on this ground suggests that the Court has been quite deferential to congressional judgments about the types of delegations that reasonably might be needed to carry on the business of government."

When Senator Kohl asked Mr. Estrada about the 1995 *Lopez* case concerning the scope of Congress' power to regulate, Mr. Estrada pointed out that he had argued in a companion case "for a very expansive view of the power to Congress to pass statutes under the Commerce Clause and have them be upheld by the court. . . . *Lopez* has given us guidance on when it is appropriate for the court to exercise the commerce power. It is binding law and I would follow it."

Ethnicity

With respect to the fact that the President had noted Miguel's ethnicity, Miguel responded to Senator Kennedy: "The President is the leader of a large and diverse country, and it is accordingly appropriate for him, in exercising his constitutional nomination and appointment powers, to select qualified individuals who reflect the breadth and diversity of our Nation."

With respect to the Democrat Congressional Hispanic Caucus's criticism of him, Miguel responded to Senator Kennedy that "I strongly disagree, however, with the Congressional Hispanic Caucus' view that I lack an understanding of the role and importance of courts in protecting the legal rights of minorities, of the values and mores of Latino culture, or the significance of role models for minority communities."

Racial Discrimination

With respect to race discrimination, Mr. Estrada stated in response to Senator Kennedy: "I take a backseat to no one in my abhorrence of race discrimination in law enforcement or anything else."

Senator Feingold asked Mr. Estrada whether he believed that racial profiling and racially motivated law enforcement misconduct are problems in this country today. Mr. Estrada replied, "I am – I will once again emphasize I'm unalterably opposed to any sort of race discrimination in law enforcement, Senator, whether it's called racial profiling or anything else. . . . I know full well that we have real problems with discrimination in our day and age."

Senator Leahy asked Mr. Estrada about whether statistical evidence of discriminatory impact is relevant in establishing discrimination. Mr. Estrada replied: "I am not a specialist in this area of the law, Senator Leahy, but I am aware that there is a line of cases, beginning with the Supreme Court's decision in *Griggs*, that suggests that in appropriate cases that [such evidence] may be appropriate. . . . I do understand that there is a major area of law that deals with how you prove and try disparate-impact cases."

Congressional Authority to Regulate Firearms

Senator Feinstein asked whether Congress may legislate in the area of dangerous firearms, and Mr. Estrada responded that the Supreme Court had ruled that "if the government were to prove that the firearm had at any time in its lifetime been in interstate commerce even if that had nothing to do with the crime at issue, that that would be an adequate basis for the exercise of Congress' power."

Right to Counsel

Senator Edwards asked about *Gideon v. Wainwright*, the Supreme Court case guaranteeing the right to counsel for poor defendants who could not afford counsel. Although Senator Edwards appeared to question the reasoning in that landmark case, Mr. Estrada responded that "I frankly have always taken it as a given that that's – the ruling in the case."

C. Answers by President Clinton's Nominees

Your criticism of Miguel Estrada's testimony creates a double standard. You did not require nominees of President Clinton to answer questions of this sort (keeping in mind that you have not identified what your additional questions to Mr. Estrada are). President Clinton's appeals court nominees routinely testified without discussing their views of specific issues or cases. A few select examples, including of several nominees who had no prior judicial experience, illustrate the point. (Please note that these are isolated examples; there are many more we can provide if necessary.)

Merrick Garland (no prior judicial experience). In the nomination of Merrick Garland to the D.C. Circuit, Senator Specter asked him: "Do you favor, as a personal matter, capital

punishment?" Judge Garland replied only that he would follow Supreme Court precedent: "This is really a matter of settled law now. The Court has held that capital punishment is constitutional and lower courts are to follow that rule." Senator Specter also asked him about his views of the independent counsel statute's constitutionality, and Judge Garland responded: "Well, that, too, the Supreme Court in *Morrison v. Olson* upheld as constitutional, and, of course, I would follow that ruling." Judge Garland did not provide his personal view of either subject.

Judith Rogers. In the hearing on Judge Judith Rogers' nomination to the D.C. Circuit, Judge Rogers was asked by Senator Cohen about the debate over an evolving Constitution. Judge Rogers responded: "My obligation as an appellate judge is to apply precedent. Some of the debates which I have heard and to which I think you may be alluding are interesting, but as an appellate judge, my obligation is to apply precedent. And so the interpretations of the Constitution by the U.S. Supreme Court would be binding on me." She then was asked how she would rule in the absence of precedent and responded: "When I was taking my master's in judicial process at the University of Virginia Law School, one of the points emphasized was the growth of our common law system based on the English common law judge system. And my opinions, I think if you look at them, reflect that where I am presented with a question of first impression, that I look to the language of whatever provision we are addressing, that I look to whatever debates are available, that I look to the interpretations by other Federal courts, that I look to the interpretations of other State courts, and it may be necessary, as well, to look at the interpretations suggested by commentators. And within that framework, which I consider to be a discipline, that I would reach a view in a case of first impression." Finally, Judge Rogers was asked her view of the three-strikes law and stated: "As an appellate judge, my obligation is to enforce the laws that Congress passes or, where I am now, that the District of Columbia Council passes." Judge Rogers did not provide her personal view of these subjects.

Marsha Berzon (no prior judicial experience). Senator Smith asked her views on *Roe v. Wade* and whether "an unborn child is a human being." Judge Berzon stated: "[M]y role as a judge is not to further anything that I personally believe or don't believe, and I think that is the strength of our system and the strength of our appellate system. The Supreme Court has been quite definitive quite recently about the applicable standard, and I absolutely pledge to you that I will follow that standard as it exists now, and if it is changed, I will follow that standard. And my personal views in this area, as in any other, will have absolutely no effect." When Senator Smith probed about their personal views on abortion and *Roe v. Wade*, Chairman Hatch interrupted: "I don't know how they can say much more than that at this point in this meeting."

Richard Tallman (no prior judicial experience). In response to written questions, Judge Tallman explained that "[j]udicial nominees are limited by judicial ethical considerations from answering any question in a manner that would call for an 'advisory opinion' as the courts have defined it or that in effect ask a nominee to suggest how he or she would rule on an issue that could foreseeably require his or her attention in a future case or controversy after confirmation." He was asked how he would have ruled in *Plessy v. Ferguson*. He stated: "It is entirely conjectural as to what I would have done without having the opportunity to thoroughly review the record presented on appeal, the briefs and arguments of counsel, and supporting legal authorities that were applicable at that time." He gave the same response when asked how he would have ruled on *Roe v. Wade.* When asked his personal view on abortion, he wrote: "I hold

no personal views that would prevent me from doing my judicial duty to follow the precedent set down by the Supreme Court." He gave the same answer about the death penalty.

Kim Wardlaw. In the hearing on Judge Kim Wardlaw's nomination to the Ninth Circuit, Judge Wardlaw was asked about the constitutionality of affirmative action. She stated (in an answer similar to Miguel Estrada's answer to the same question): "The Supreme Court has held that racial classifications are unconstitutional unless they are narrowly tailored to meet a compelling governmental interest."

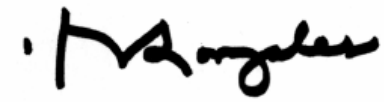
Maryanne Trump Barry. In the hearing on Judge Maryanne Trump Barry's nomination to the Third Circuit, Senator Smith asked for her personal opinion on whether "an unborn child at any stage of the pregnancy is a human being." Judge Barry responded: "*Casey* is the law that I would look at. If I had a personal opinion – and I am not suggesting that I do – it is irrelevant because I must look to the law which binds me."

Raymond Fisher. In the hearing on Judge Raymond Fisher's nomination to the Ninth Circuit, Senator Sessions asked Judge Fisher's own personal views on whether the death penalty was constitutional. Judge Fisher responded that "My view, Senator, is that, as you indicated, the Supreme Court has ruled that the death penalty is constitutional. As a lower appellate court judge, that is the law that I am governed by. I don't want in my judicial career, should I be fortunate enough to have one, to inject my personal opinions into whether or not I follow the law. I believe that the precedent of the Supreme Court is binding and that is what my function is."

V. Conclusion

Miguel Estrada is a well-qualified and well-respected judicial nominee who has very strong bipartisan support. Based on our reading of history, we believe that you have ample information about this nominee and have had more than enough time to consider questions about his qualifications and suitability. We urge you to stop the unfair treatment, end the filibuster, allow an up-or-down vote, and vote to confirm Mr. Estrada.

Sincerely,



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The Honorable Thomas A. Daschle
The Honorable Patrick Leahy

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The Honorable Orrin Hatch